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APPLICATION OF

COLUMBIA GAS OF VIRGINIA, INC.

CASE NO. PUE990781

**For approval of a special
rate and contract**

HEARING EXAMINER'S RULING

February 17, 2000

On November 12, 1999, Columbia Gas of Virginia, Inc. ("Columbia") filed an Application for Approval of a Special Rate and Contract ("Application") pursuant to § 56-235.2 of the Code of Virginia. Columbia seeks approval of its agreement of January 26, 1999, with Chaparral (Virginia) Inc. ("Chaparral") for firm transportation of natural gas and balancing services for Chaparral's steel recycling facility in Dinwiddie County. Columbia requested confidential treatment of parts of the Application and attached materials and filed a redacted copy to be placed in the Commission's public file. On January 13, 2000, the Commission entered an Order for Notice and Hearing establishing a procedural schedule in this matter. Among other things, the Commission requested that Columbia supplement its Application to provide the Commission information on why confidential treatment is required. The Commission also invited Columbia to request the entry of an order governing confidential treatment of materials filed in this proceeding.

On January 24, 2000, Columbia filed with the Clerk of the Commission a Motion for Protective Order, along with a draft protective order. In support of its Motion, Columbia argues that its Application contains financial information that could be detrimental to Chaparral if released to Chaparral's competitors. The information may provide Chaparral's competitors a valuable insight into a key component of Chaparral's production costs as well as anticipated plant production factors. Columbia further argues the release of such information could be detrimental to Columbia's position in negotiating special rates or rates under Schedule LVTS with other potential customers by setting an inappropriate benchmark in negotiating such rates. The confidential information redacted from the public version of the Application includes sensitive contract provisions, Columbia's total capital investment in the facilities constructed to serve Chaparral, cost of service studies (with Chaparral), and class rates of return (with Chaparral). The contract provisions withheld from public disclosure include the rate, term, maximum daily quantity (and associated delivery pressure), annual consumption and retainage.

By Hearing Examiner's Ruling entered on January 27, 2000, the Staff and any other party were afforded an opportunity to file a response to Columbia's Motion.

The Staff filed its response to Columbia's Motion on February 4, 2000. The Staff does not object to the entry of a protective order in this case. However, the Staff takes issue with the draft protective order appended to Columbia's Motion. The Staff opposes any requirement that would require it to sign an agreement to gain access to confidential information filed with the

Clerk. The Staff argues that such a requirement is inconsistent with the Protective Order entered in the only other application for a special rate and contract, and it is inconsistent with Guideline 2 of the Guidelines for Filing an Application to Provide Electric and Gas Service under a Special Rate, Contract, or Incentive, 20 VAC 5-310-10, adopted in Case No. PUE970695. The portion of the regulation relied on by the Staff provides that:

[u]nredacted copies of documents containing information so marked shall be withheld from public disclosure by the clerk of the commission for commission and staff review unless disclosure is ordered by the commission. Copies of documents redacted to exclude confidential information shall be filed and placed in the public file.

The Staff further objects to Columbia's characterization in its draft protective order of two types of confidential information, "confidential information" and "detrimental confidential information." The Staff argues the language in the draft protective order is ambiguous and suggests a subjective classification by Columbia of those who may have access to "detrimental confidential information." The Staff argues in favor of a protective order similar to the one entered by the Commission in Application of Virginia Electric and Power Company, For approval of a special rate and contract pursuant to § 56-235.6 of the Code of Virginia, Case No. PUE980333 (July 16, 1998, Protective Order, D.C.C No. 980730028).

On February 10, 2000, Columbia filed a Reply to the Staff's Response. In its Reply, Columbia argues that it proposed the requirement that each party sign an agreement to gain access to confidential information to ensure that each party understands its obligation to keep such information confidential. Additionally, Columbia argues the Staff's objection to classifying certain information "detrimental confidential information" ignores the highly competitive environment in which Chaparral operates, and the potential harm Columbia and/or Chaparral would suffer if such information were disclosed to the wrong party.

The pleadings filed herein have raised two important issues. The first issue involves the Staff's access to confidential information filed with the Commission. I agree with the Staff that the Commission's Rules for Filing an Application to Provide Electric and Gas Service under a Special Rate, Contract or Incentive (20 VAC 5-310-10 *et seq.*) provide the Staff with the same access to confidential information as that enjoyed by the Commission, and that is unrestricted access. Therefore, the Staff is not required to execute any agreement to have access to confidential information filed with the Commission. However, Columbia has raised a valid concern. Columbia is entitled to reasonable assurances that the confidential information it supplied with its Application is protected from disclosure. The following ruling provides that assurance by directing the Staff and its counsel to comply with the terms of the protective ruling and limits the Staff's access to those working on this proceeding.

The second issue involves degrees of confidential information, and whether sensitive confidential information is easily distinguishable from other confidential information. On this issue, I believe Columbia's concern over "confidential information" and "competitively sensitive information" is misplaced. From my perspective, it is too difficult to tell the difference between information that should be confidential and information that should be subject to greater

protection because it is competitively sensitive. The real issue involving trade secrets or proprietary information is who should have access to the information in the context of the proceeding before the Commission. The Staff is not a competitor or customer of Columbia or Chaparral. Therefore, the disclosure of such information to the Staff should not be an issue. In the performance of its regulatory duties, the Staff is not permitted to divulge personal or proprietary information, except as required by statute or court order. On the other hand, if a competitor or customer of Columbia or Chaparral requested access to proprietary information filed with the Commission, a question does arise whether they should be permitted access to the information. In civil litigation, there are almost no trade secrets or proprietary information that may be excluded from discovery, not even the formulae for Coca-Cola.¹ The lesson here is that under the right circumstances everything but privileged information is discoverable. The question for the trier-of-fact is whether those circumstances exist. In the context of this proceeding, that question has not arisen since no competitor or customer of Columbia or Chaparral has filed a notice of appearance as a party in this proceeding. In the event this does occur, paragraph (5) of the following ruling addresses the disclosure of commercially or competitively sensitive information.

THEREFORE, IT IS DIRECTED THAT any documents, materials, and information to be produced by Columbia, including the redacted portion(s) of its Application and attached materials (the “Application”), or to be produced by any other party (“Other Party”) in this proceeding in response to Commission Orders, Hearing Examiner Rulings, Commission Staff (the “Staff”) data requests, or properly propounded interrogatories or requests for production of documents from Other Parties in the proceeding, which documents, materials, or information the producing party designates as confidential (“Confidential Information”), which designation may include competitively or commercially sensitive information, shall be produced, examined and used only in accordance with the following conditions:

- (1) The Clerk of the Commission is directed to maintain under seal all documents, materials, and information filed with the Commission in this proceeding which the producing party has designated, in whole or in part, as Confidential Information.
- (2) All Confidential Information produced to Columbia, the Staff, or Other Parties shall be used solely for purposes of this proceeding, including any appeals.
- (3) Access to Confidential Information shall be specifically limited to Columbia, the Staff, or Other Parties, their counsel and expert witnesses, and to support personnel who are working on this case under the direction of their counsel or expert witnesses and to whom it is necessary that the Confidential Information be shown for the purposes of this proceeding. In order to obtain access to such information, the Staff witnesses and their attorneys are hereby

¹ See, Coca-Cola Bottling Company v. Coca-Cola Company, 107 F.R.D. 288, 290 (D. Del. 1985) (“Except for a few privileged matters, nothing is sacred in civil litigation; even the legendary barriers erected by The Coca-Cola Company to keep its formulae from the world must fall if the formulae are needed to allow plaintiffs and the Court to determine the truth in these disputes.”)

directed to treat all Confidential Information received in connection with this case as set forth in this Ruling. In order to obtain access to such information, Columbia and all Other Parties, their counsel and expert witnesses shall sign an Agreement to Adhere to the Protective Ruling (“Agreement”), which is Attachment A to this Ruling. Staff counsel and expert witnesses are not required to sign the Agreement. All Agreements shall be promptly forwarded to the producing party upon execution and the producing party shall provide a list of those persons entitled to access to Confidential Information to the Clerk of the Commission and all counsel of record.

- (4) In the event that Columbia, the Staff, or Other Parties seek permission to grant access to any Confidential Information to any person other than the persons authorized to receive such information under paragraph (3) above, the party desiring permission shall seek the consent of counsel for the producing party. The producing party shall be under no obligation to furnish Confidential Information to persons other than those described in paragraph (3) above unless specifically ordered by the Commission or its Hearing Examiner to do so. Parties are encouraged, however, to seek stipulations to the maximum extent practicable. In the event of a negative response, the party seeking disclosure permission may apply to the Commission or its Hearing Examiner for such permission.
- (5) In the event Columbia or Other Parties contend that they should not be required to produce, to parties other than the Staff, specific documents, materials or information due to their commercially or competitively sensitive nature, or that access to competitively sensitive information should be restricted, Columbia or such Other Party shall bear the burden of proving that such specific documents, materials, or information should not be discoverable, or access should be restricted, by appropriate motion to the Commission or its Hearing Examiner.
- (6) In the event Columbia, the Staff, or Other Parties seek to introduce at a hearing, testimony, exhibits, or studies that disclose Confidential Information, the party seeking such introduction shall:
 - (a) Notify the producing party at least three (3) days in advance of any such hearing regarding testimony that is not prefiled unless a shorter period would not unduly prejudice the producing party.
 - (b) If such testimony is prefiled, file such testimony, exhibits, or studies with the Commission under seal and serve on all parties of record copies of the testimony, exhibits, or studies deleting those parts that contain references to or portions of the designated Confidential Information. The testimony, exhibits, or studies containing the Confidential Information filed with the Commission shall be kept under seal unless and until the Commission or its Hearing Examiner

rules to the contrary. Each party that is entitled to receive Confidential Information shall, upon signing Attachment A to this Ruling, receive a copy of those parts of the testimony, exhibits, or studies that contain references to or portions of the Confidential Information and each party and counsel shall be bound by this Ruling insofar as it restricts the use of and granting of access to the Confidential Information.

- (7) Oral testimony regarding Confidential Information, if ruled admissible by the Commission or its Hearing Examiner, shall be taken in camera and in the presence of only those persons who have been granted access to the Confidential Information pursuant to this Ruling and that portion of the transcript recording such testimony shall be placed in the record under seal.
- (8) No person authorized under this Ruling to have access to Confidential Information shall disseminate, communicate, or reveal any such Confidential Information to any person not specifically authorized under this Ruling to have access thereto.
- (9) At the conclusion of this proceeding (including any appeals), any originals or reproductions of any Confidential Information produced pursuant to this Ruling shall be returned by Columbia and Other Parties to the producing party (or destroyed) if requested to do so by the producing party. At such time, any originals or reproductions of any Confidential Information in the Staff's possession will be returned to the producing party, destroyed, or kept with the Staff's permanent work papers in a manner that will preserve the confidentiality of the documents, materials, or information.
- (10) This Ruling does not preclude Columbia, the Staff, or any Other Party from arguing, prior to public disclosure, that documents, materials, or information received under this Ruling should not be treated as confidential. But in no event shall any party disclose Confidential Information it has received subject to this Ruling absent a finding by the Commission or its Hearing Examiner that such information does not require confidential treatment. If Columbia, the Staff, or any Other Party desires to make such assertion, the producing party shall be given reasonable notice before being required to bear the burden of proving the contrary, and reasonable notice shall be at least three (3) days in advance of a hearing in connection with testimony that is not prefiled and contains Confidential Information. The burden of proving that documents, material, or information require confidential treatment as trade secrets, commercially or competitively sensitive information, or other grounds for confidential treatment shall be upon the person requesting that the documents, materials, or information be held in confidence.
- (11) A producing party is obligated to separate non-confidential documents, materials, and information from Confidential Information wherever

practicable, and to produce the non-confidential documents, materials, and information in a timely manner.

Michael D. Thomas
Hearing Examiner

ATTACHMENT A

APPLICATION OF

COLUMBIA GAS OF VIRGINIA, INC.

CASE NO. PUE990781

**For approval of a special
rate and contract**

AGREEMENT TO ADHERE TO PROTECTIVE RULING

I, _____, on behalf of and representing
_____, hereby acknowledge having read and understood
the terms of the Protective Ruling entered in this proceeding by the Hearing Examiner on
February 17, 2000, and agree to treat all Confidential Information that I receive, review,
or to which I have access in connection with this Case No. PUE990781 as set forth in that
Protective Ruling.

Signature: _____

Printed Name: _____

On behalf of: _____